

Fort Wayne Roofing and Sheet Metal Corp. (“FW Roofing”) appeals the trial court’s summary judgment in favor of Wells Fargo Bank (“Wells Fargo”). FW Roofing raises two issues, which we restate as one: whether the trial court erred when it found that FW Roofing was not a third-party beneficiary of the loan agreement between Allen County and Corporation for Community Housing (“Developer”) to which Wells Fargo was Trustee.

We affirm.

FACTS AND PROCEDURAL HISTORY

The trial court in its order of judgment and Wells Fargo set the facts as follows:

In 1999, Allen County, Indiana floated a bond issue for the acquisition and rehabilitation of the Embassy Apartments. The bonds were sold to investors with Atlas Financial Corporation (“Atlas”) being the majority bond-holder. The Defendant, [Developer] and Allen County, Indiana entered into a loan agreement in the amount of \$7,600,000.00 (“Loan Agreement”). [Wells Fargo] and Allen County, Indiana entered into a Trust Indenture whereby Wells Fargo contracted to service the Loan Agreement.

A portion of the proceeds from the sale of the bonds was placed in an “Acquisition and Rehabilitation Account” administered by Wells Fargo. The funds were to be used for the costs of acquisition of the property and the rehabilitation of the apartment complex. The Developer would request payment from the account as expenses were incurred for the rehabilitation of Embassy Apartments. A request for funds would involve the Developer preparing a requisition packet, containing a Requisition and Certification Form and a cover letter delineating the signatures of the Developer and Atlas in order to approve the requisition. Once approved, Wells Fargo would disperse the money to the Developer according to the instructions set forth in the cover letter that was part of the requisition request.

[FW Roofing] was a contractor hired by Developer to repair the roofs of various apartment buildings in the apartment complex, Embassy Apartments. FW Roofing submitted several invoices to the Developer for work performed at the project.

After receipt of the invoices submitted by FW Roofing, the Developer submitted to Wells Fargo several requisition packets seeking payment of the

sums due and owing to FW Roofing as well as numerous other contractors and subcontractors. The Developer, in the cover letter that was included in the requisition packet, instructed Wells Fargo to pay to Developer the sums necessary to pay the various contractors and subcontractors. The requisitions were approved by Wells Fargo and pursuant to the directions of the Developer, payment was made directly to the Developer, which was in direct contradiction of paragraph 2 of the Requisition and Certification Form, directing Wells Fargo to make the various payments directly to the creditors. Unfortunately, the Developer, despite having received the requisitioned funds from Wells Fargo, failed to pay FW Roofing all of the sums that were due and owing to FW Roofing.

On February 7, 2005, FW Roofing filed a cross-claim against Wells Fargo contending that Wells Fargo failed to properly administer the project fund and/or failed to make disbursements to FW Roofing directly.

Wells Fargo filed a motion for summary judgment contending that (1) FW Roofing has no standing to enforce the terms of the Trust Indenture, and (2) that no breach of the Trust Indenture has occurred because the parties to the Trust Indenture mutually waived the necessity of strict performance of the terms of the Trust Indenture.

FW Roofing also filed a Motion for Summary Judgment contending that it was entitled to a summary judgment because FW Roofing was a third-party beneficiary entitled to receive direct payment of its invoices from Wells Fargo and that Wells Fargo breached a contractual duty to pay the invoices directly to FW Roofing instead of the Developer.

Appellant's App. at 14-15.

The trial court denied FW Roofing's motion for summary judgment and granted Wells Fargo's motion for summary judgment. FW Roofing now appeals.

DISCUSSION AND DECISION

A. Standard of Review

When reviewing a grant or denial of summary judgment, we apply the same standard as the trial court: summary judgment is only appropriate when the designated evidence shows that there is no genuine issue of material fact and that the moving party is entitled to

judgment as a matter of law. Ind. Trial Rule 56(C); *Jacobs v. Hilliard*, 829 N.E.2d 629, 632 (Ind. Ct. App. 2005), *trans. denied*. The burden is on the moving party to designate sufficient evidence to eliminate any genuine issues of material fact, and when this requirement is fulfilled, the burden shifts to the nonmoving party to come forth with contrary evidence. *Jacobs*, 829 N.E.2d at 632. We construe all facts and reasonable inferences to be drawn from those facts in favor of the nonmoving party. *Id.* The entry of specific findings and conclusions offer insight into the reasons for the trial court's decision and facilitate appellate review, but are not binding on this court. *Troxel Equip. Co. v. Limberlost Bancshares*, 833 N.E.2d 36, 40 (Ind. Ct. App. 2005), *trans. denied*.

B. Third-Party Beneficiaries

FW Roofing contends that it is a third-party beneficiary to Allen County and Developer's Loan Agreement for which Wells Fargo served as Trustee. "Generally, only those who are parties to a contract or those in privity with a party have the right to enforce the contract." *Indiana Gaming Co. v. Blevins*, 724 N.E.2d 274, 277 (Ind. Ct. App. 2000) (citing *OEC-Diasonics, Inc. v. Major*, 674 N.E.2d 1312, 1314-15 (Ind. 1996)). FW Roofing is not a party to the loan agreement, and it does not argue that it is in privity with any party to the agreement.

In order for FW Roofing to show that it is a third-party beneficiary, it must establish:

- (1) A clear intent by the actual parties to the [Loan] Agreement to benefit [FW Roofing];
- (2) A duty imposed on one of the contracting parties in favor of [FW Roofing]; and
- (3) Performance of the [Loan] Agreement terms is necessary to render [FW

Roofing] a direct benefit intended by the parties to the [Loan] Agreement.

Gaming, 724 N.E.2d at 277 (citations omitted). Under this analysis, the controlling factor is the intent of the parties, and it must clearly appear from the terms of the Loan Agreement that Allen County and Wells Fargo, as parties to the Trust Indenture, clearly intended to confer a benefit on FW Roofing. *Id.*

FW Roofing claims that the completed Exhibit C, Requisition and Certificate Form, in the Loan Agreement listed them as a creditor to be paid directly by the trustee and constituted direct evidence that the parties intended to benefit FW Roofing. We disagree.

Paragraph 11.04 of the Trust Indenture states:

[n]othing in this Indenture expressed or implied is intended or shall be construed to confer upon, or to give to, any person, other than the Issuer, the Trustee, the Trust, the Developer and the Owners of the Bonds, any right, remedy or claim under or reason of this Indenture or any covenant, condition or stipulation of this Indenture; and all the covenants, stipulations, promises, and agreements in this Indenture contained by and on behalf of the Issuer shall be for the sole and exclusive benefit of the Issuer, the Trustee, the Trust, the Developer, and the Owners of the Bonds.

Appellant's App. at 136. The plain and ordinary meaning of the foregoing language is that the parties to the indenture did not intend to confer any benefit upon any entity who was not a party to the agreement or expressly designated therein. In the only contract to which Wells Fargo was a party, i.e. the Trust Indenture, the unambiguous terms specified that Wells Fargo did not intend to confer any benefit on any party other than those to the agreement. *See Gaming*, 724 N.E.2d 279 (to find third-party beneficiary would render terms of contract meaningless).

Accordingly, we hold that the trial court did not err and in finding that FW Roofing is

not a third-party beneficiary of the Loan Agreement and Trust Indenture and in granting Wells Fargo's motion for summary judgment.

Affirmed.

DARDEN, J., and MATHIAS, J., concur.